

Paper No. 15
EWH/ak

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB MARCH 17, 99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re GAMMA-METRICS

Serial No. 74/674,958

Edward W. Callan for Gamma-Metrics

Dominic J. Ferraiuolo, Trademark Examining Attorney, Law
Office 102 (Thomas V. Shaw, Managing Attorney)

Before Hanak, Hohein and Chapman, Administrative Trademark
Judges.

Opinion by Hanak, Administrative Trademark Judge:

GAMMA-METRICS (applicant) seeks to register CROSSBELT
in typed capital letters for "computer based analyzer for
detecting the chemical composition of bulk materials." The
application was filed on May 17, 1995 with a claimed first
use date of August 30, 1993.

The Examining Attorney has refused registration
pursuant to section 2(e)(1) of the Lanham Trademark Act on

the basis that applicant's mark is merely descriptive of applicant's goods.

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request a hearing.

This case has a rather unusual history. In the first office action, the Examining Attorney made of record six articles from the NEXIS database wherein the term "crossbelt" appeared. The Examining Attorney then made the following statement: "As seen in the attached excerpts of articles retrieved from a search of the NEXIS database, a CROSSBELT is a type of conveyor belt. Inasmuch as the applicant's goods include a built in CROSSBELT, the mark is descriptive of a feature of the goods."

In response, applicant noted that the conveyor belt shown in its product literature was not part of its computer based analyzer, but rather was merely used in conjunction with the computer based analyzer. In addition, applicant pointed out that the six NEXIS stories dealt with products totally unrelated to computer based analyzers for detecting the chemical composition of bulk materials. Three of the stories describe a type of sander and the other stories describe various types of separators.

The Examining Attorney accepted both of applicant's arguments, and yet surprisingly, still held that CROSSBELT was descriptive when applied to computer based analyzers for detecting the chemical composition of bulk materials. In his brief, the Examining Attorney acknowledges that a conveyor belt is not a feature of applicant's goods. (Examining Attorney's brief page 4).

As for the initial six NEXIS stories, the Examining Attorney now simply states that these stories show that "the term 'crossbelt' has other meanings in relation to other types of goods for various applications, such as belt sanders." (Examining Attorney's brief page 5).

However, in the second and final office action, the Examining Attorney made of record a report presented by Steven A. Regis of California Portland Cement Company at the Cement Industry Technological Conference held at Hershey, Pennsylvania on April 20-24, 1997.

In his appeal brief, the Examining Attorney discusses only one piece of evidence which he contends demonstrates that CROSSBELT is merely descriptive of applicant's goods, namely, the Regis report. Relying upon the Regis report, the Examining Attorney no longer contends (as he once did) that CROSSBELT is descriptive of a component (i.e. the conveyor belt) of applicant's goods. Rather, the Examining

Attorney now contends that "the term 'crossbelt' identifies the type of analyzer." (Examining Attorney's brief page 5).

We turn now to an examination of the Regis report. The first mention of CROSSBELT appears in paragraph two of the report, as follows: "The Crossbelt Analyzer project was a 1995 Capital Budget project. [Arizona Portland Cement] ordered the equipment from GammaMetrics in February and completed the installation in August 1995."

This first mention of CROSSBELT makes use of this term not in a descriptive manner, but rather in a trademark manner. Not only is the term "Crossbelt" depicted with an initial capital letter, but in addition, applicant (GammaMetrics) is identified as the source of this particular brand of analyzer.

Subsequently, there appear three more references to the "crossbelt analyzer" wherein the word "crossbelt" is depicted in all lower case letters. It is these manners of depiction which the Examining Attorney relies upon to support his contention that "the term 'crossbelt' identifies the type of analyzer."

The burden of proving that applicant's mark is descriptive rests with the Examining Attorney. This burden is simply not met by making of record only one report wherein applicant's mark is, on a few occasions, depicted

in all lower case letters. This is particularly true when at the outset, the report properly depicts applicant's mark with an initial capital letter, and, moreover, the report makes it clear that applicant is the source of the CROSSBELT analyzer.

Based upon this extremely meager evidentiary record which in its final state consists of only one report wherein applicant's mark is both properly and improperly depicted, we find that there exist, at a minimum, doubts as to whether applicant's mark is descriptive of its goods. It is the practice of the Board to resolve doubts on the issue of mere descriptiveness in applicant's favor and pass the mark to publication. In re Gourmet Bakers, 173 USPQ 565 (TTAB 1972).

Decision: The refusal to register is reversed.

E. W. Hanak

G. D. Hohein

B. A. Chapman
Administrative Trademark
Judges, Trademark Trial
and Appeal Board

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